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No. 80-1863

In the Supreme Court of the United States

OCTOBER TERM, 1980

PEABODY COAL COMPANY, PETITIONER

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

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QUESTION PRESENTED

Whether the Surface Mining Control and Reclamation Act of 1977 authorizes the Secretary of the Interior to promulgate regulations requiring the States, if they wish to administer the permanent regulatory programs, to obtain from surface mining permit applicants information in addition to items expressly enumerated in the Act.

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OPINIONS BELOW

The opinion of the court of appeals en banc (Pet. App. 1a-45a) is reported at 15 E.R.C. 1802. The opinion of the panel of the court of appeals (Pet. App. 48a-72a) is reported at 14 E.R.C. 1813. The opinion of the district court denying petitioner's motion for partial summary judgment (Pet. App. 73a-143a) is reported at 14 E.R.C. 1083. The opinion of the court of appeals affirming the district court's denial of a preliminary injunction (Pet. App. 144a-147a) is reported at 617 F.2d 807. The opinion of

the district court denying petitioner's motion for preliminary injunction (Pet. App. 148a-187a) is reported at 13 E.R.C. 1586.

JURISDICTION

The judgment of the court of appeals en banc was filed on April 1, 1981 (Pet. App. 291a). A petition for writ of certiorari was filed on May 6, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. III) 1201 *et seq.*, Congress established "a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. (Supp. III) 1202(a). The Secretary of the Interior (Secretary), acting through the Office of Surface Mining Reclamation and Enforcement, has the primary responsibility for administering the Act by promulgating regulations and enforcing its provisions. Section 201(c), 30 U.S.C. (Supp. III) 1211(c).

The principal regulatory and enforcement provisions of the statute are contained in Title V, 30 U.S.C. (Supp. III) 1251-1279. Section 501 of the Act, 30 U.S.C. (Supp. III) 1251, establishes a two-stage program for the regulation of surface coal mining. Section 501(a) provides for an initial, or interim, regulatory phase, and Section 501(b) provides for the subsequent, permanent phase of the program. During the initial period, the Secretary has exclusive authority to enforce the Act, although the States may assist him in enforcing the standards applicable during the interim phases. 30 U.S.C. (Supp. III) 1252

(e). The interim regulation of surface coal mining by the Secretary is not in issue here.

For the permanent phase, Congress provided, in Section 503 of the Act, 30 U.S.C. (Supp. III) 1253, that each State wishing to do so could assume primary responsibility for enforcing the Act on nonfederal lands within its borders. Such state regulatory programs are, however, to be subject to continuing federal oversight (see, *e.g.*, Sections 517 and 521, 30 U.S.C. (Supp. III) 1267 and 1271),[1] and they may not go into effect until they have been approved by the Secretary, pursuant to Sections 501(b) and 503 of the Act. If a State fails to submit a program that meets with the Secretary's approval within the prescribed time—or simply decides not to undertake the primary enforcement responsibility under the Act—the Secretary promulgates and enforces a federal program for the State. Section 504(a), 30 U.S.C. (Supp. III) 1254(a).

The Secretary's function of approving or disapproving State regulatory programs cannot be performed ad hoc. Section 501(b) of the Act, 30 U.S.C. (Supp. III) 1251(b), specifically requires him to promulgate and publish "regulations * * * establish-

[1] Section 517(a) of the Act provides for federal inspections of mining and reclamation operations to permit the Secretary "to evaluate the administration of approved State programs." Section 521(a) of the Act provides for federal inspections and enforcement measures in cases in which a State has failed to take action to remedy an apparent violation of the Act; and Section 521(b) provides for direct federal enforcement of a regulatory program within a State when it is determined that the State has failed to enforce its program effectively.

In Section 520 of the Act, 30 U.S.C. (Supp. III) 1270, Congress also provided for enforcement of the Act through citizens suits brought in the district courts.

ing procedures and requirements for preparation, submission, and approval of State programs * * *." Section 201(c)(2), 30 U.S.C. (Supp. III) 1211(c)(2), requires him, in more general terms, "to publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of [the Act]."

To obtain the Secretary's approval of its proposed program, a State must, pursuant to Section 503(a), demonstrate that it "has the capability of carrying out the provisions of [the Act] and meeting its purposes" through, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the [Act's] requirements," a state law providing for the effective implementation of a mining permit system (see discussion, pages 4-5, *infra*), and "rules and *regulations consistent with regulations issued by the Secretary pursuant to [the Act]*" (emphasis added). Consistent with these requirements, Section 701(25) of the Act, 30 U.S.C. (Supp. III) 1291(25), defines a "State program" as one duly established "to regulate surface coal mining and reclamation operations, on lands within such State in accord with the requirements of [the Act] and regulations issued by the Secretary pursuant to [the Act]."

The express statutory requirements that a state program must incorporate a detailed set of environmental protection performance standards specified in Sections 515 and 516 of the Act, 30 U.S.C. (Supp. III) 1265 and 1266, to be met by any person who engages in surface coal mining operations within the Act's coverage, and a permit system. The permit system is the primary means through which the Act, including its performance standards, is enforced,

since Section 506(a) of the Act, 30 U.S.C. (Supp. III) 1256(a), provides that no one may engage in surface coal mining operations without first obtaining a permit from either the State "pursuant to an approved State program" or the Secretary, if he is the regulatory authority for the lands in question.

The Act also includes requirements pertaining to the operation of the permit system, *e.g.*, application requirements and requirements to be met by reclamation plans submitted with applications (Sections 507 and 508, 30 U.S.C. (Supp. III) 1257 and 1258), bonding requirements for permittees (Section 509, 30 U.S.C. (Supp. III) 1259), and procedures and decisional criteria for permit approval or denial (Sections 510, 513 and 514, 30 U.S.C. (Supp. III) 1260, 1263 and 1264). In prescribing application requirements, Section 507(b) of the Act lists specific categories of information that, "among other things," each permit application must contain. These include such matters as the identity of the owners of the land and mining business concerned, the proximity of buildings to the permit area, the history of the applicant with respect to bond forfeiture or permit revocations under the Act, descriptions of the mining methods proposed, probable effects on surface and ground water systems, and other information pertinent to the determination whether the applicant is likely to be able to carry out his proposed operations in a manner that will comply with the Act's requirements for environmental protection and land reclamation. Section 508 of the Act requires the submission of a detailed reclamation plan as part of the permit application and describes information that must be included in the plan.

b. On March 13, 1979, pursuant to his rulemaking authority in Sections 201(c)(2) and 501(b) of

the Act, the Secretary promulgated regulations for the permanent regulatory programs. 30 C.F.R. Part 700 *et seq.*, 44 Fed. Reg. 15313 (1979). The regulations, *inter alia*, establish the procedures by which state programs may be submitted and reviewed and the requirements they must meet in order to be approved. This includes specification of the minimum information that the programs must require applicants for surface coal mining permits to submit with their applications. 30 C.F.R. Parts 778-780 and 782-784. The regulations call for the submission of the information specified in Sections 507 and 508 of the Act and additional information, based on these and other sections of the Act, falling into the same general categories as those found in the statute, *i.e.*, (1) information relating to the identity of the mine operator and owners of interests in affected land; (2) the applicant's record of compliance with mining and reclamation laws, (3) environmental data relating to the permit area, and (4) the proposed mining and reclamation plan, including the engineering techniques to be used.

The regulations also provide, in a section known as the "state window" provision (30 C.F.R. 731.13), that a State may, in its program submission, propose alternatives to specific regulation provisions, so long as it demonstrates that such alternatives will be consistent with the Act and implementing regulations and are necessitated by "local requirements or local environmental or agricultural conditions."

2. This action was commenced by petitioner, several other coal companies and mining trade associations, two States, and several environmental organizations, who filed nine separate complaints in the United States District Court for the District of Columbia, pursuant to Section 526(a)(1) of the Act,

30 U.S.C. (Supp. III) 1276(a)(1), challenging the validity of the Secretary's regulations on various grounds.[2] Petitioner, *inter alia*, challenged the Secretary's authority to issue *any* permit requirement regulations with respect to the state programs, contending that the question of what information to demand of applicants beyond that expressly specified in the Act is entierly within the province of the State, unless the State chooses not to undertake the primary enforcement responsibility permitted it under the Act (Pet. App. 102a-103a, 182a).

On August 21, 1979, the district court, having consolidated the complaints, denied several motions for preliminary injunctive relief (Pet. App. 148a-187a), holding, *inter alia*, that petitioner was unlikely to prevail on the merits of its claim respecting the Secretary's authority to promulgate the permit information regulations (*id.* at 182a-183a). The order denying preliminary injunctive relief was affirmed on the appeals of petitioner and several other parties (*id.* at 144a-147a).

Because the parties were jointly making approximately one hundred separate challenges to the Secretary's regulations, the district court divided the challenges into two "rounds" of litigation (Pet. App. 73a-74a). On February 26, 1980, ruling on motions for partial summary judgment in the "First Round," the district court held (*id.* at 75a-79a, 102a-105a), *inter alia*, that the Secretary has the requisite authority under Sections 201(c)(2) and 501(b) of the

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[2] Section 526(a)(1) provides that the action of the Secretary in promulgating national rules or regulations is reviewable exclusively in the United States District Court for the District of Columbia.

Act, 30 U.S.C. (Supp. III) 1211(c)(2) and 1251(b), to promulgate regulations concerning the substance of state regulatory programs under the Act, including permit information requirements, and to condition his approval of permanent state programs on a showing that the programs are consistent with those regulations. Reviewing challenges to particular regulatory provisions, the court upheld some and remanded others to the Secretary for revision, having found that they lacked a rational basis in the statute (Pet. App. 80a-102a, 105a-142a).[3]

3. Pursuant to Rule 54(b), Fed. R. Civ. P., the district court directed the entry of a final judgment on petitioner's claim that the Secretary lacked authority to promulgate the permit information regulations, and petitioner appealed from that judgment (Pet. App. 52a). The court of appeals panel, one judge dissenting, reversed the district court (*id.* at 48a-72a), concluding (*id.* at 53a-56a) that, although the language of the Act could reasonably be read to confer on the Secretary the rulemaking authority he claimed and the legislative history was "a blind alley," the "Act's purposes and structure" revealed "that the Act itself defines the minimum information permit applications must contain and that the Secretary's authority in this area is limited to deter-

[3] Following the "Second Round" of briefing, the district court ruled on the remaining challenges to particular regulations, again upholding some and invalidating others. *In re Permanent Surface Mining Regulation Litigation*, Civ. Action No. 79-1144 (Consolidated) (D.D.C. May 16, 1980). The Secretary has recently decided to undertake a thorough review of all of the regulations promulgated under the Act (see 46 Fed. Reg. 34349 (1981)), and has moved in the court of appeals to have proceedings there (on appeal from the district court decision) held in abeyance pending the outcome of this review.

mining whether the states have satisfied that minimum." The panel accordingly held (*id.* at 56a) "that the Secretary lacks power to demand that states require more information from applicants than the Act itself spells out."

4. The court of appeals, on rehearing en banc, four members dissenting, vacated the panel decision and affirmed the district court (Pet. App. 1a-45a). The court noted at the outset (*id.* at 5a-6a) that it was deciding only the narrow question "whether the Secretary has rulemaking authority to require that permit applicants submit *any* items of information beyond those enumerated in the Act" and that its review did not "extend to the question whether the regulations actually promulgated by the Secretary are permissible exercises of that authority."

The court found in the statute's language and legislative history a congressional intent to afford the States (1) "an opportunity to propose regulatory programs of their own, conforming to the requirements of the Act and to regulations promulgated by the Secretary" and (2) the right, once their programs are approved, to operate as "the exclusive 'on the scene' regulatory authorit[ies,]" subject only to "the Secretary's oversight function[,] * * * shared in part by the public, which is given the right to sue in federal court, to compel compliance with the state program and its permits" (Pet. App. 7a-11a). The court noted (*id.* at 16a) that, given this basic statutory scheme, "[t]he importance of an adequate data base to state decisionmaking [concerning the issuance of particular permits], federal supervision, and citizen oversight makes the state program's information-gathering provisions crucial to the success of the Act." It found the Secretary's promulgation of regulations requiring additional information from

permit applicants in approved state programs a measure that is both in keeping with the Secretary's duty to monitor a State's "overall performance in administering the Act" (*id.* at 24a) and clearly preferable to case-by-case decisions on state programs, without clear published guidelines of the standards for program approval (*id.* at 22a-23a).

Finally, after examining the text of the Act and the legislative history indicating Congress's intent to list in the statute "the *type* of information" it wished States to have "at [their] disposal" in making decisions on applications for surface mining permits (*id.* at 25a-27a), the court held (*id.* at 28a) that "the Act's explicit listings of information required of permit applicants are not exhaustive, and do not preclude the Secretary from requiring the states to secure additional information needed to ensure compliance with the Act."

ARGUMENT

To the extent that petitioner challenges the narrow holding of the court of appeals sustaining the Secretary's authority, under the Surface Mining Control and Reclamation Act of 1977, to establish standards for his approval of state regulatory programs by promulgating, *inter alia*, permit information regulations that do more than merely reproduce the statutory text, petitioner's contention is based on an incorrect reading of the plain language and the legislative history of the Act. To the extent that petitioner contends that the Secretary's permit information regulations are unduly lengthy and burdensome, its challenge is premature, since the court of appeals did not decide that question and since, in any event, the Secretary is at present engaged in a full-scale

reconsideration of all the regulations promulgated under the Act. Accordingly, review by the Court is not warranted.

1. Petitioner's principal argument (Pet. 11-13, 17-19) is that the decision of the court of appeals gives the Secretary "unlimited power to impose any regulations he chooses" (Pet. 17), and, contrary to congressional policy and constitutional considerations, leaves the States no significant role in administering provisions of the Act. Its argument represents a misunderstanding both of the decision below and the framework of the Act.

The court of appeals' construction of the Act recognizes (Pet. App. 8a) a State's authority, in a properly approved regulatory program, as "the sole issuer of permits"—*i.e.*, the authority that "decides who will mine in what areas, how long they may conduct mining operations, and under what conditions the operations will take place." Similarly, the court acknowledges (Pet. App. 9a, 24a) the State's authority to rule on the acceptability of particular reclamation plans, set bond amounts, inspect mines for compliance, impose appropriate penalties, and require data from permit applicants in addition to that provided for in the Act and implementing regulations. The Act's grant of this enforcement authority to the States is responsive to the congressional concern underlying the finding in Section 101(f) of the Act, 30 U.S.C. (Supp. III) 1201(f), on which petitioners place special weight (Pet. 6-7, 13-14), that "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations," the States should exercise "primary governmental responsibility" for "developing,

authorizing, issuing, and enforcing regulations for surface mining * * * operations."[4]

But, as the court of appeals correctly pointed out (Pet. App. 11a-13a), Congress was also intent on establishing a "nationwide program to protect society and the environment from the adverse effects of coal mining operations" (Section 102(a), 30 U.S.C. (Supp. III) 1202(a)) and providing uniform standards for surface coal mining "in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders" (Section 101(g), 30 U.S.C. (Supp. III) 1201(g)). See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, No. 79-1538 (June 15, 1981), slip op. 15. Petitioner contends (Pet. 18) that Congress remedied the problem, then existing, of inadequate mining regulation practices *solely* by prescribing performance standards and listing, in the statute, information to be required with permit applications. But this argument ignores

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[4] The Secretary has also accommodated, in his "state window" regulation, 30 C.F.R. 731.13, this congressional concern that States be allowed to operate regulatory programs that take into account differing local conditions. Under that regulation, as construed by the district court (Pet. App. 83a), a state proposing an alternative to one of the Secretary's substantive regulations need only demonstrate that "(1) local conditions make it difficult to meet the federal standard; (2) the state alternative relates to local conditions; and (3) the alternative is no less stringent than the federal regulation."

The Secretary has recently proposed for comment a modification of the "state window" regulation that would allow States to adopt any regulations that are as effective as those promulgated by the Secretary in meeting the requirements of the Act. 46 Fed. Reg. 34348 (1981).

the plain language of the Act specifying the Secretary's responsibilities and defining the programs through which the States exercise their regulatory authority.

Thus, the Secretary is obligated, by the terms of Section 501(b) of the Act, to promulgate regulations establishing "requirements" for his "approval of [s]tate programs." States submitting regulatory programs must, pursuant to Section 503(a)(7), demonstrate their ability to carry out the provisions of the Act and its purposes by showing, among other things, that they have provided for "rules and regulations consistent with regulations issued by the Secretary pursuant to [the Act]." Accordingly, a "[s]tate program" is one established pursuant to Section 503 to regulate surface coal mines on lands within the State "in accord with the requirements of [the Act] and regulations issued by the Secretary pursuant to [the Act]."

The fact—emphasized by petitioner (Pet. 14-15)—that the sections of the Act "dealing with permitting and bonding, including the information requirements" speak only of "the regulatory authority" and do not refer to the Secretary is not inconsistent with the court of appeals' understanding of the Secretary's role. When the State is acting as "the regulatory authority," it is doing so in an approved state program; and, as noted, the Secretary's role in program approval is defined in other sections of the Act.

Similarly, contrary to petitioner's suggestion (Pet. 18), the mere fact that Congress listed, in the statute, the information that "among other things" must be submitted by a permit applicant, is not inconsistent with the Secretary's promulgation of regulations requiring the submission of additional information on matters similar to those listed in the statute. As

the court of appeals noted (Pet. App. 25a-26a), the relevant House Committee report emphasized the need for a "thorough and comprehensive data base" for proper permitting decisions and explained that the bill would delineate "in detail the *type of information* required in permit applications in sections 507 and 508." H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 91 (1977) (emphasis added). Indeed, if the Secretary were limited to merely reproducing the text of the statute, permit applicants would be able to avoid supplying information that is plainly essential to making certain that the grant of a particular permit will not violate express terms of the Act. For example, as the court of appeals noted (Pet. App. 4a), the regulation requiring the submission of waivers from the owners of occupied dwellings within 300 feet of proposed surface mining activities (30 C.F.R. 778.16(c)) is necessary to implement the requirement in Section 522(e)(5) of the Act, 30 U.S.C. (Supp. III) 1272(e)(5), that no covered surface coal mining operations be permitted within that distance of occupied dwellings "unless waived by the owner thereof."

Given the congressional purposes outlined above and the statutory framework that embodies them, it is reasonable to take Congress at its word in granting to the Secretary in Section 501(b) the power to promulgate regulations establishing "requirements," as distinguished from "procedures," for his approval of state regulatory programs. It is similarly reasonable to construe the grant of authority in Section 201(c)(2) of the Act—which gives the Secretary the power to promulgate regulations "necessary to carry out the purposes and provisions of [the] Act"—as a provision authorizing him to promulgate permit application information regulations that will assist

him in his duty to approve only those state programs that he is persuaded will fulfill the Act's purposes, that will give notice to the States of his standards for approval and thereby expedite the approval process, and that will facilitate his task of monitoring the effectiveness of State programs. Such regulations are " 'reasonably related to the purposes of the enabling legislation' " and therefore sustainable under established standards for reviewing the validity of regulations. *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973), quoting *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268, 280-281 (1969). See also *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 796 (1978). This rational nexus requirement imposes substantive limits on the Secretary's rulemaking authority, and thus does not leave the Secretary free, as petitioner contends (Pet. 17), "to impose any regulations he chooses."

By contrast, petitioner's implicit contention that the Secretary lacks power to promulgate *any* substantive regulations relating to the permit application information to be required in state programs would lead to unreasonable results. Either the Secretary, in exercising his approval authority, would function essentially as a clerk, comparing the text of the state laws and regulations comprising the proposed state programs with the text of the federal statute and verifying that the texts are identical, or he would exercise his judgment as the principal official responsible for administering the statute and for assuring that its purposes are achieved, but base his approval decisions on unpublished standards made known to the States only *after* he has decided whether to approve their programs. The court of appeals properly refused to accept as a credible construction of the stat-

ute a reading that would limit the Secretary to these options (Pet. App. 21a-23a).

Finally, there is no merit to petitioner's suggestion (Pet. 11) that constitutional considerations dictate acceptance of its proposed construction of the Act because the Act is "a land-use provision" that pushes "deeply into an area of traditional state authority * * *." As this Court observed in *Hodel* v. *Indiana*, No. 80-231 (June 15, 1981), slip op. 14 n.18 "[T]he Surface Mining Act is [not] a land use measure after the fashion of the zoning ordinances typically enacted by state and local governments." Rather, it is a statute regulating a private activity—surface coal mining—that Congress rationally concluded "has substantial effects on interstate commerce" and that Congress accordingly may regulate under the Commerce Clause without offending any prerogatives of the States under the Tenth Amendment. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, *supra*, slip op. 13-15, 21-26.

2. By its repeated emphasis (Pet. 5, 10-11 & n. 12, 12, 18) on the number of columns and pages taken up by the Secretary's regulations and the alleged burdensomeness of those regulations, petitioner suggests that the regulations are vulnerable to attack even if the Secretary is authorized to do more than copy the Act's provisions. But, as the court of appeals observed (Pet. App. 19a), petitioner had been "participating" in the district court, in the process of challenging individual regulations on the grounds that they are "arbitrary, capricious, or inconsistent with the Act," and nothing in the court of appeals' opinion forecloses "[petitioner's] challenges to individual regulations." Moreover, as we have explained (page 8 note 3, *supra*), the Secretary is at present engaged in reviewing each of the regulations,

and until that review is completed, it is uncertain what regulatory requirements permit applicants will ultimately be asked to meet. Because of that uncertainty and because the court of appeals did not address the burdensomeness contention, that question is not properly before the Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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